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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Christine Arnold, et al.,
9 Plaintiffs,

10 v.

11 Standard Pacific of Arizona Incorporated, et
12 al.,
13 Defendants.

No. CV-16-00452-PHX-DGC

ORDER

14
15 Plaintiff Christine Arnold asks the Court to award attorneys' fees and costs against
16 Defendants Standard Pacific of Arizona, Inc. and HSP Arizona, Inc. pursuant to Federal
17 Rule of Civil Procedure 54(d) and Local Rule 54.2(b). Doc. 31. The motion has been
18 fully briefed (Docs. 31, 32, 33, 36), and neither party has requested oral argument. For
19 the reasons that follow, the Court will grant Plaintiff's motion in part.

20 **I. Background.**

21 Plaintiff purchased a single-family home in Avondale, Arizona, entering into a
22 purchase contract with Defendant Standard Pacific of Arizona, Inc. Doc. 25 at 18. The
23 purchase contract and addenda provided that any disputes, claims, or controversies
24 relating to the contract would be settled by arbitration, which in turn would be governed
25 by the procedures set forth in the contract's limited warranty. Doc. 20-2 at 9. According
26 to this warranty, Defendants contracted with an entity known as Professional Warranty
27 Service Corporation ("PWC"), and PWC alone would select the service that would
28 arbitrate any potential claims. Doc. 25. The contract also contained a fallback provision

1 that would take effect if the arbitration provision was determined unenforceable. *Id.* at
2 26. The fallback provision stated that any disputes between the parties would be
3 submitted to the American Arbitration Association (“AAA”). *Id.*

4 In August 2015, Plaintiff filed a demand for arbitration with the AAA, alleging
5 construction defects in her home. Doc. 16, ¶ 20. Defendants filed a motion to dismiss,
6 alleging that Plaintiff was not entitled to proceed under the fallback provision because the
7 warranty arbitration provision had not been found invalid. *Id.*, ¶ 21. Jeffrey S. Cates, the
8 arbitrator appointed by the AAA, granted the motion and stayed the arbitration. Doc. 20-
9 6 at 3. Plaintiff then filed a complaint with this Court seeking declaratory relief
10 concerning the validity and enforceability of the warranty arbitration provision. Doc. 1.
11 The Court granted summary judgment in favor of Plaintiff and found that the provision
12 was unenforceable as a matter of law. Doc. 29.

13 **II. Analysis.**

14 Plaintiff seeks an award of attorneys’ fees in the amount of \$28,265.35, as well as
15 \$466.65 in taxable costs. Doc. 33 at 9. Defendants argue that Plaintiff is not entitled to
16 fees and costs and, even if she were, the requested award is not reasonable. Doc. 32.

17 **A. Eligibility.**

18 Although the parties agree that the Federal Arbitration Act (“FAA”) governs
19 arbitration proceedings between them, they disagree about whether the FAA prohibits an
20 award of attorneys’ fees in this case. Doc. 32 at 3; Doc. 33 at 4. Plaintiff contends that
21 “the contractual rights of the parties for the underlying contracts are subject to Arizona
22 law” and she “seeks attorneys’ fees directly related to her action in district court to
23 enforce her contractual right to fair arbitration.” *Id.* at 3. Because she is “not seeking
24 costs associated with the actual arbitration,” she contends, the FAA does not apply. *Id.* at
25 4. Defendants disagree, and argue that “Arizona’s fee shifting statute is not applicable
26 here” because “the FAA preempts inconsistent or contrary state law. . . [and i]nterpretive
27 case law makes clear that the FAA does not provide for an award of attorneys’ fees.”
28 Doc. 32 at 3.

1 The underlying dispute between the parties was governed by state law. According
 2 to the FAA, an arbitration provision “shall be valid, irrevocable, and enforceable, save
 3 upon such grounds as exist at law or in equity for the revocation of any contract.” 9
 4 U.S.C. § 2. The Supreme Court has held that “generally applicable contract defenses,
 5 such as fraud, duress, or unconscionability, may be applied to invalidate arbitration
 6 agreements without contravening § 2.” *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S.
 7 681, 687 (1996). As a result, “state law, whether of legislative or judicial origin, is
 8 applicable [to an agreement to arbitrate] if that law arose to govern issues concerning the
 9 validity, revocability, and enforceability of contracts generally.” *Perry v. Thomas*, 482
 10 U.S. 483, 492 n.9 (1987) (emphasis in original). Arizona unconscionability law applies
 11 to contracts broadly and is not targeted at arbitration agreements. *AT&T Mobility LLC v.*
 12 *Concepcion*, 563 U.S. 333, 339 (2011) (citing *Doctor’s Associates*, 517 U.S. at 687). The
 13 Ninth Circuit agrees that “state law is not entirely displaced from federal arbitration
 14 analysis.” *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 936-37 (9th Cir. 2001).

15 Defendants cite *Clausen v. Watlow Elec. Mfg. Co.*, 242 F. Supp. 2d 877 (D. Or.
 16 2002), for the proposition that although state law principles apply to the validity and
 17 enforceability of a contract, “whether and how to apply those defenses is a matter of
 18 federal law.” Doc. 32 at 3 (also referring to *Clausen* for the conclusion that the “scope
 19 and enforcement of arbitration agreement is a matter of federal substantive law”). The
 20 *Clausen* court determined whether the arbitration provision at issue bound the plaintiff
 21 signatory in his individual capacity or solely as a representative of his corporation. 242
 22 F. Supp. 2d at 883. The issue before the court was not the enforceability or validity of
 23 the arbitration provision, but its meaning and scope. The court made clear that the “FAA
 24 . . . does not preempt state law regarding the validity, revocability and enforceability of
 25 contracts generally. Thus, to resolve the issue whether the parties entered into a valid and
 26 enforceable written agreement to arbitrate, the court must apply general, state-law
 27 principles of contract interpretation.” *Id.* at 882 (internal quotation marks and citation
 28 omitted). Defendants make no effort to explain how Plaintiff’s claim, like the claim in

1 *Clausen*, involved the scope of the parties' agreement. It involved the enforceability of
2 the warranty arbitration provision. Consequently, the Court will apply state law.

3 Defendants also argue that Arizona law providing for the award of attorneys' fees
4 is inconsistent with the FAA, which does not provide such awards. Doc. 32 at 3.
5 Defendants cite to a decision by the District Court for the District of Hawaii, which found
6 that "[a]ttorneys' fees are not available under the Federal Arbitration Act." *Metzler*
7 *Contracting Co. LLC v. Stephens*, 774 F. Supp. 2d 1073, 1089 (D. Haw. 2011). But the
8 petition in *Metzler* was seeking confirmation of an arbitration award and requested
9 attorneys' fees related to such efforts. In concluding that the petitioner could not recover
10 attorneys' fees under Hawaii law, the court noted that "the Federal Arbitration Act
11 governs the Court's evaluation of both [petitioner's] motion to confirm and the
12 [respondent's] petition to vacate." *Id.* at 1089. Plaintiff in this case did not seek
13 confirmation of an arbitration award. She asserted the invalidity of the warranty
14 arbitration provision, and her claim was governed by Arizona law, not the FAA.

15 Finally, Defendants argue that the parties' "clearly stated intent was for there to be
16 no fee shifting with respect to the resolution of any disputed issues." Doc. 32 at 9. But
17 the contract provisions cited by Defendants specifically provide that each party will bear
18 its own costs and fees for *arbitration* under the terms of the contract. Doc. 31 at 4 n.3.
19 This case was not an arbitration, but a dispute concerning the enforceability of a contract
20 provision that was governed by Arizona law.

21 Arizona law provides that, "[i]n any contested action arising out of a contract,
22 express or implied, the court may award the successful party reasonable attorneys' fees."
23 A.R.S. § 12-341.01(A). An award of attorney's fees under this statute is discretionary
24 with the trial court. *Wilcox v. Waldman*, 744 P.2d 444, 450 (Ariz. Ct. App. 1987).
25 Arizona law similarly allows a successful party in a civil action to recover costs.
26 A.R.S. §§ 12-341, 12-332. Because Plaintiff was a successful party in a contract dispute
27 governed by Arizona law, the Court may exercise its discretion to award reasonable
28 attorneys' fees and costs.

1 **B. Entitlement.**

2 In determining whether to exercise its discretion to award attorneys' fees under
3 A.R.S. § 12-341.01(A), the Court must consider the following factors:

- 4 1) the merits of the unsuccessful party's claim;
- 5 2) whether the successful party's efforts were completely superfluous in
6 achieving the ultimate result;
- 7 3) whether assessing fees against the unsuccessful party would cause
8 extreme hardship;
- 9 4) whether the successful party prevailed with respect to all relief sought;
- 10 5) whether the legal question presented was novel or had been previously
11 adjudicated; and
- 12 6) whether a fee award would discourage other parties with tenable claims
13 from litigating.

14 *Assoc. Indemn. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985); *Am. Const. Corp. v.*
15 *Philadelphia Indemn. Ins. Co.*, 667 F. Supp. 2d 1100, 1106-07 (D. Ariz. 2009); *City of*
16 *Phoenix v. Glenayre Elecs., Inc.*, 375 P.3d 1189, 1198-99 (Ariz. Ct. App. 2016).

17 The first factor weighs strongly in favor of Plaintiff. The warranty arbitration
18 provision had already been determined unenforceable as fundamentally unfair by the
19 Hawaii Supreme Court in *Nishimura v. Gentry Homes, Ltd.*, 338 P.3d 524 (Haw. 2014).
20 This Court also found that the provision was clearly unconscionable and thus
21 unenforceable.

22 The second factor weighs in favor of Plaintiff. The challenge to the warranty
23 arbitration provision was necessary to provide Plaintiff with a fair forum to seek relief
24 under her contract. As the Court found, the warranty arbitration provision did not
25 provide Plaintiff with an "effective substitute for the judicial forum." Doc. 29 at 9 (citing
26 *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004)).

27 The third factor favors Plaintiff. Defendants are substantial business entities and
28 make no contention that fees would impose an undue hardship on them.

1 The fourth and fifth factors weigh in favor of Plaintiff because she prevailed on
 2 her only claim for relief before this Court. Additionally, as noted above, the issue had
 3 already been litigated in the Hawaii Supreme Court, putting Defendants on notice that
 4 their position lacked merit.

5 With respect to the sixth factor, Defendants do not contend that an award of fees
 6 would discourage future parties with tenable claims from litigating.

7 In sum, the six factors identified by Arizona cases, taken together, strongly favor
 8 granting Plaintiff attorneys' fees. The Court concludes that Plaintiff is entitled to recover
 9 fees under A.R.S. § 12-341.01.

10 **C. Are Fees Recoverable in This Matter?**

11 Plaintiff relied on the lodestar analysis in calculating her request for attorneys'
 12 fees. Defendants argue that "[l]odestar may be an appropriate method of determining a
 13 fee award in a damages case. Not so here in which the plaintiff did not request, and did
 14 not receive, a damage award. . . . A lodestar analysis has no application to a declaratory
 15 relief action as there is no damage award to which it would apply." Doc. 32 at 4.
 16 Defendants do not cite any law to support this proposition, and the Court does not find
 17 any. Rather, Arizona courts have recognized that the lodestar figure is presumed to be
 18 the proper reasonable fee. *Timmons v. City of Tucson*, 830 P.2d 871, 878 (Ariz. Ct. App.
 19 1991).

20 Defendants also argue that because Plaintiff and her attorney entered into a
 21 contingent fee agreement, "Plaintiff has no obligation to pay her counsel for any of the
 22 fees incurred in this matter and, as a result, there is no entitlement to fees under A.R.S.
 23 § 12-341.01." Doc. 32 at 5. While Defendants correctly state that a litigant's genuine
 24 financial obligation to pay her attorney is necessary before any award of attorneys' fees
 25 may be granted, the cases cited by Defendant recognize that a contingent fee agreement is
 26 such a genuine obligation. *Moedt v. Gen. Motors Corp.*, 60 P.3d 240, 243 (Ariz. Ct. App.
 27 2002); *Lisa v. Strom*, 904 P.2d 1239, 1243 n.3 (Ariz. Ct. App. 1995).¹ According to

28 ¹ The court in *Lisa* was concerned with a *pro se* attorney litigant seeking attorneys'

Defendants, because Plaintiff has not yet received any damages award, she is under no financial obligation to pay her attorney. The Court is not persuaded. Defendants cite no law holding that a litigant does not have a financial obligation simply because she has not yet received a damages award. Rather, precedent suggests that the financial obligation is created when the contingency fee agreement is entered, not when damages are awarded. *Lisa*, 904 P.2d at 1243 n.3 (“an agreement to pay attorney’s fees out of the recovery itself is a genuine financial obligation.”) (emphasis in original).

D. Is the Amount of the Requested Fee Award Reasonable?

Plaintiff originally sought \$34,378 in fees and costs, but revised her request in response to Defendants’ contention that this amount was unreasonable. Doc. 33. The Court has reviewed the revised itemized statement of requested attorneys’ fees (Doc. 33-1) and finds the total amount to be reasonable.

Using the lodestar analysis, “[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Bogard v. Cannon & Wendt Elec. Co.*, 212 P.3d 17, 28 (Ariz. Ct. App. 2009) (quoting *Timmons*, 830 P.2d at 878). Plaintiff seeks reimbursement at a rate of \$300 per hour for partners, \$200 per hour for associates, and \$80-85 per hour for paralegals. Doc. 31 at 8. Defendants do not challenge the reasonableness of these rates, and, taking into account market rates in the region for the type of work undertaken, the Court also finds them reasonable.

Defendants do challenge whether these fees relate to work directly relevant to issues before this Court. Doc. 32 at 5. Defendants argue that Plaintiff is not entitled to fees incurred before the filing of the first amended complaint on March 28, 2016. According to Defendants, fees incurred before this date fall into two categories which

fees when he had not actually incurred any out-of-pocket expenses, as well as any interpretation of the law which would allow a *pro se* attorney to recover fees where a *pro se* laymen could not. 904 P.2d at 1244. These concerns are not at issue here. Plaintiff’s attorney challenged the enforceability of the warranty arbitration provision as part of his effort to obtain damages for his client. There is no dispute that he incurred costs in doing so.

1 should be excluded from any potential award.

2 First, Defendants argue that Plaintiff is not entitled to any fees incurred in relation
3 to the underlying arbitration initiated by Plaintiff in August 2014. *Id.* at 7. Defendants
4 argue that this leaves only “fees incurred for the preparation of the [first amended
5 complaint], preparation and filing of the initial case management report, and the briefing
6 and argument in support of plaintiff’s Motion for Judicial Relief. All other claimed fees
7 were incurred in relation to the failed arbitration and are not recoverable.” *Id.* at 6. The
8 Court does not agree. All itemized fees incurred in relation to the enforceability of the
9 warranty arbitration provision were necessitated by Defendants’ position, resulted in this
10 lawsuit, and are reasonable and recoverable.

11 Second, Defendants argue that the fees incurred in relation to Plaintiff’s original
12 complaint are not recoverable. *Id.* at 7. The original complaint included claims on behalf
13 of six plaintiffs. Doc. 1. As Defendants point out, this complaint “necessitated an
14 amendment as the plaintiffs could not establish that they each met the jurisdictional
15 requirement for the Court to assert diversity jurisdiction over their claims.” Doc. 32 at 7.
16 The Court agrees that Plaintiff may not recover fees incurred in relation to this
17 jurisdictional defect. Plaintiff’s counsel should have known that the original plaintiffs’
18 claims could not be aggregated to satisfy the amount in controversy requirements. *See*
19 *Urbino v. Orkin Servs. of California, Inc.*, 726 F.3d 1118, 1122 (9th Cir. 2013) (“The
20 traditional rule is that multiple plaintiffs who assert separate and distinct claims are
21 precluded from aggregating them to satisfy the amount in controversy requirement.”).
22 Any work aimed at establishing federal diversity jurisdiction over the claims of the other
23 five plaintiffs was not reasonable. Plaintiff emphasizes that she amended her complaint
24 in response to Defendants’ motion to dismiss based on lack of jurisdiction, rather than
25 litigate the issue, so as to reduce costs. Doc. 33 at 8. This is not sufficient to render
26 related attorneys’ fees reasonable. The Court finds that any fees incurred in response to
27 the issue of jurisdiction are unreasonable and should be removed from the final award.
28 The Court will remove items 13-15, 17-18, 32-40 from the award of attorneys’ fees.

1 Doc. 33-1.

2 After reviewing Plaintiff's evidence with these conclusions in mind, the Court will
3 award Plaintiff \$23,727 in attorneys' fees and \$466.65 in costs.

4 **E. Compliance with Local Rules.**

5 Defendants argue that Plaintiff's fee request should be denied for failure to comply
6 with local rule 54.2(d)(1):

7 No motion for award of attorneys' fees will be considered unless a separate
8 statement of the moving counsel is attached to the supporting memorandum
9 certifying that, after personal consultation and good faith efforts to do so,
10 the parties have been unable to satisfactorily resolve all disputed issues
11 relating to attorneys' fees or that the moving counsel has made a good faith
12 effort, but has been unable, to arrange such conference.

13 LRCiv 54.2(d)(1). While Plaintiff's original motion did not contain the required
14 statement (Doc. 31), her reply brief does (Doc. 33-2). Defendants argue that this
15 correction is not sufficient to satisfy the rule because the consultation did not occur
16 before the motion for costs and fees was made and because Plaintiff did not discuss the
17 three substantive objections raised by Defendants in their response. Doc. 36-1 at 2. The
18 Court will not deny Plaintiff's motion on this basis. Although consultation before filing a
19 motion for fees and costs is clearly the required practice, the Court concludes that
20 Plaintiff's subsequent consultation substantially complied with this rule and that denial of
21 fees on this basis would be unjust. Defendants have made clear that they oppose any fee
22 award on multiple grounds.

23 **IV. Motion to Seal.**

24 Plaintiff seeks to file under seal her fee agreement with counsel. Doc. 34.
25 Defendants oppose the motion. Doc. 36-1 at 2-3. Two standards generally govern
26 requests to seal documents. "First, a 'compelling reasons' standard applies to most
27 judicial records." *Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 677-78 (9th Cir. 2010
28 (citing *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006);
Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135-36 (9th Cir. 2003)). "[A]

1 party seeking to seal judicial records must show that ‘compelling reasons supported by
2 specific factual findings outweigh the general history of access and the public policies
3 favoring disclosure.’” *Pintos*, 605 F.3d at 678 (quoting *Kamakana*, 447 F.3d at 1178).
4 The second standard applies to “‘private materials unearthed during discovery,’ as such
5 documents are not part of the judicial record.” *Id.* (quoting *Kamakana*, 447 F.3d at
6 1180). The “good cause” standard set forth in Rule 26(c) of the Federal Rules of Civil
7 Procedure applies to this category of documents. *See id.*; *San Jose Mercury News, Inc. v.*
8 *U.S. Dist. Court–N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir.1999). For good
9 cause to exist, “the party seeking protection bears the burden of showing specific
10 prejudice or harm will result if no protective order is granted.” *Phillips v. G.M. Corp.*,
11 307 F.3d 1206, 1210-11 (9th Cir. 2002); *see Foltz*, 331 F.3d at 1130. The good cause
12 standard applies to documents attached to non-dispositive motions because those
13 documents are often “‘unrelated, or only tangentially related, to the underlying cause of
14 action.’” *Phillips*, 307 F.3d at 1213 (citation omitted).

15 Because the contingency fee agreement is attached to a non-dispositive motion,
16 the good cause standard will apply. Plaintiff argues that the agreement should be filed
17 under seal because “it contains protected personal information, professional business
18 strategies and potential trade secrets. Specifically, the fee agreement describes in part
19 Plaintiff’s counsels’ methods of litigating a case and strategy regarding retention of
20 clientele. Such proprietary information is protectable under seal.” Doc. 34 at 3. Plaintiff
21 further alleges that, if this agreement is not filed under seal, Plaintiff’s counsel would
22 likely “suffer professionally as other firms could adopt Plaintiff’s strategy in client
23 retention, or utilize their knowledge of the fee agreement to engage in gamesmanship
24 during the course of a case to ensure Plaintiff’s counsel is not paid.” *Id.* at 4.

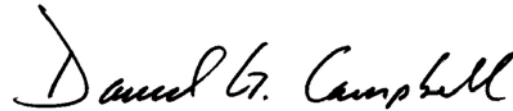
25 Defendants do not allege, and the Court does not find, any significant public
26 interest in access to the content of the agreement. Plaintiff has met her burden of
27 showing good cause and overcoming the presumption of public access.

28 ///

IT IS ORDERED:

1. Plaintiff's motion for attorneys' fees and costs (Doc. 31) is **granted in part** and **denied in part**. Plaintiff is awarded attorneys' fees and costs in the amount of \$24,193.65.
2. Plaintiff's motion to seal (Doc. 34) is **granted**. The Clerk is directed to accept for filing under seal the document lodged as Doc. 35 on the Court's docket.
3. Defendant's motion for leave to file a sur-reply (Doc. 36) is **granted**.

Dated this 2nd day of December, 2016.



David G. Campbell
United States District Judge